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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 1189

WILSON & CO., INC., A CORPORATION,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PAUL WARE,
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To the Honorable Justices of the Supreme Court of the United States:

The petition of Wilson & Co., Inc., petitioner in the above captioned case, respectfully shows:

Statement of the Matter Involved.

An order of the National Labor Relations Board (hereinafter called the "Board") under Sections 8 (1) and (2) of the National Labor Relations Act (hereinafter called the "Act") has been enforced against petitioner by a decree of the Seventh Circuit Court of Appeals.

The opinion of the Seventh Circuit Court of Appeals is reported in 126 F. (2d) 114 and appears in the Record at pages 1550-1554.

The decision and order of the Board appears in the Record at pages 1509-1531.

The Board's order adversely affects Wilson & Co., Inc., petitioner, at its meat packing plant at the Union Stock Yards, Chicago, Illinois, and the rights guaranteed to approximately 3600 of its employees under the Act.

Petitioner is ordered to cease and desist from dominating or interfering with the administration of, and contributing financial or other support to, (1) the former Joint Representative Committee Plan and the Joint Representative Committee established thereunder, which were found to have "terminated on December 15, 1936"; (2) the current unaffiliated labor organization known as the Wilson Employees' Representation Plan and the Employees' Representative Committee established thereunder; and (3) any other labor organization of its employees.

The Board's order also requires petitioner to cease recognizing and to disestablish completely the Employees' Representation Plan and the Committee as the collective bargaining agency of its employees.

The order in broad language further requires petitioner to cease interfering with all rights covered in Section 7 of the Act and to post notices of compliance.

The Board dismissed allegations of the complaint charging that petitioner questioned its employees as to their union activities, warned them not to become affiliated with outside unions and not to vote for the C. I. O. Union in the Board-conducted election, and that it threatened to close its plant if the C. I. O. Union won that election.

The charge (R. 1437) was filed by Local Union No. 25, United Packinghouse Workers of America, of P. W. O. C.,

affiliated with the C. I. O. (herein called the "C. I. O. Union").

A study of this voluminous record such as was made by the Seventh Circuit Court of Appeals can only justify its conclusion that "shocking injustices" are disclosed. The Circuit Court of Appeals, however, erroneously enforced the Board's order, although clearly it would not have done so had it not adopted a rule "that evidence which would not appeal to any normal rational appraiser of the truth, may yet fall within the field of 'some evidence' " (126 F. (2d) at 117) which it inadvertently believed was the construction by this Court placed upon the substantial evidence rule in *National Labor Relations Board* v. *Automotive Maintenance Co.*, decided February 16, 1942, 62 Sup. Ct. 608; *National Labor Relations Board* v. *Foote Bros. Gear & Machine Corp.* (1940), 311 U. S. 620; and *National Labor Relations Board* v. *Link-Belt Co.* (1941), 311 U. S. 584.

This Court has uniformly held that substantial evidence is essential to support an order of the Board. Evidence which amounts to no more than a scintilla, which does no more than create a suspicion of the fact to be established, and which a reasonable mind would not accept as adequate to support the Board's conclusion, such as that in this case, is not substantial evidence. The rule applied by the Seventh Circuit Court of Appeals not only nullifies the review provisions of Section 10 (f) of the Act, but is in direct conflict with the substantial evidence rule announced by this Court in *National Labor Relations Board* v. *Columbia Enameling & Stamping Co.* (1939), 306 U. S. 292, 299-300.

Another fundamental issue presented to the Seventh Circuit Court of Appeals was that the court in equity and good conscience should not enforce the Board's order. It was shown that this proceeding was not commenced or prosecuted for the purpose of preventing or correcting alleged unfair labor practices, but was instituted and prose-

cuted for the sole purpose of eliminating a rival labor organization of the C. I. O. Union after the usual and lawful administrative proceedings [a Board-conducted election (R. 1042-1055)] had failed.

One of the defenses (R. 1445-1448) tendered to the complaint (R. 1439) presented this issue and was urged at the hearing (R. 6-7, 20, 66) before the Board (R. 1503-1506), and in the Circuit Court of Appeals (R. 1539-1541). The Trial Examiner (R. 1480) and the Board (R. 1510-1511) rejected this issue, denied (R. 489) petitioner's application for *subpoenas* and *subpoenas duces tecum* (R. 1458-1462), denied (R. 9) a motion to produce books and papers (R. 1457-1458), refused to admit offered evidence, refused to consider evidence admitted, and refused (R. 489) to consider a competent written offer of proof (R. 1468-1473),[1] all of which established beyond question petitioner's defense.

The Board has obtained enforcement of an order which destroys the rights guaranteed to 3600 employees under the Act; which disregards completely the stipulation by the Board, the C. I. O. Union and the Employees' Representative Committee that both unions were "labor organizations" within the meaning of the Act, that each claimed the right to represent petitioner's employees, and that an election was desired (R. 999-1000, 1030, 1031); and which ignores its finding (R. 1035) and order directing an election in which the names of each union should appear on the ballot (R. 1033-1040). The stipulation and order were made with full knowledge of all the facts concerning the forma-

[1] At the request of the Trial Examiner (R. 65, 147) petitioner introduced, without objection, its written offer of proof which was received in evidence as its Exhibit No. 3 (R. 150). At the conclusion of the hearing it was understood by the Trial Examiner and attorney for petitioner that the written offer was to be considered as a formal offer of proof (R. 757-758).

tion and operation of the Employees' Representation Plan and the Committee which are the basis of the Board's disestablishment order (R. 1468-1473).

The petitioner urges that under all of the circumstances in this proceeding, the Seventh Circuit Court of Appeals should have passed upon this question of law and exercised its equitable powers by denying enforcement of an order of an administrative agency of the United States which enters the Court with unclean hands to seek enforcement of its order that is arbitrary and capricious, and that was entered after a display of conduct which is not "in accordance with the cherished judicial tradition embodying the basic concept of fair play."

The complaint alleges that because of allegations in paragraphs 6 and 7, petitioner violated Section 8 (2) of the Act (R. 1441), and that by allegations in paragraphs 6, 7 and 9, petitioner violated Sections 7 and 8 (1) of the Act (R. 1441-1442). As to Section 7, the allegations of paragraph 9 of the complaint were dismissed (R. 1531) and petitioner was found guilty of the alleged violations of Section 8 (2) and the technical resulting violation of Section 8 (1).

Nevertheless, petitioner was ordered in the broad language of paragraph 1 (c) (R. 1530), to cease and desist from in any other manner restraining, coercing or interfering with the rights of its employees as guaranteed in Section 7 of the Act. Petitioner is further ordered, in paragraph 2 (c) (R. 1530-1531), to announce to the world that it has violated Section 7 and subsections (1) through (5) of Section 8 when all of such violations were not alleged in the complaint and not justified under the circumstances in this case by the order.

Jurisdiction.

The judgment of the Circuit Court of Appeals for the Seventh Circuit was entered February 19, 1942 and a peti-

tion for rehearing was filed March 6, 1942, which was denied March 25, 1942. The jurisdiction of this Court is invoked under Section 10 (f) of the National Labor Relations Act and Section 240 (a) of the Judicial Code, as amended.

Statute Involved.

The pertinent provisions of the National Labor Relations Act (49 Stat. 449-457) are printed in the Appendix.

Questions Presented.

The following questions are presented:

1. Whether the Seventh Circuit Court of Appeals erred in assuming that it was bound to enforce the order against petitioner because there was "some evidence" to support the Board's findings, when, at the same time it expressly recognized that the evidence in the record overwhelmingly opposed the Board's findings and "would not appeal to any normal, rational appraiser of the truth."

2. Whether there is substantial evidence to support the Board's order.

3. Whether, under the circumstances in this proceeding, the Seventh Circuit Court of Appeals erred in refusing to exercise its review and equity powers to deny enforcement of the Board's order, or remand the proceedings for further hearing before the Board.

4. Whether the Seventh Circuit Court of Appeals erred in enforcing the broad provisions of paragraphs 1 (c) and 2 (c) of the Board's order.

Reasons for Granting the Writ.

1. The decision of the court below enforcing the order of the Board is squarely in conflict with the decision of this Court in *National Labor Relations Board* v. *Columbian*

Enameling & Stamping Co. (1939) 306 U. S. 292, 299-300, wherein it was held that such orders must be supported by "substantial evidence."

While the court below recognized that the evidence herein "would not appeal to any normal, rational appraiser of the truth" and "would not be sufficient to sustain a finding in any ordinary civil suit" and that "the findings were so overwhelmingly opposed by the evidence" as to require them to be set aside, yet it assumed, contrary to the *Columbian Enameling* case, that because there was "some evidence," even though not "substantial," to support the order of the Board, the court was bound to enforce the order.

2. The decision of the court below is based upon a wholly erroneous construction of its equitable jurisdiction to review orders of the Board under Section 10 (e) and (f) of the Act and is in direct conflict with the decision of this Court in *Ford Motor Co.* v. *National Labor Relations Board* (1939) 305 U. S. 364, 373. The court below has erroneously failed to correct abuses of power by this administrative agency in the performance of its *quasi*-judicial function when that agency did not "accredit" itself "by acting in accordance with the cherished judicial tradition embodying the basic concepts of fair play" in conflict with the decision of this Court in *Morgan* v. *United States* (1938) 304 U. S. 1, 22.

3. The decision of the court below in refusing to recognize petitioner's defense, that this proceeding was commenced and prosecuted solely for the purpose of eliminating the labor organization which defeated the Board-sponsored C. I. O. Union in a fair election conducted by the Board, and that it was not commenced or prosecuted for the purpose of preventing and correcting alleged unfair labor practices, is squarely in conflict with the decision of the Circuit Court of Appeals for the Sixth Circuit in *Na-*

tional Labor Relations Board v. *Indiana-Michigan Electric Co.* (1941) 124 F. (2d) 50, 56. In the latter proceeding the court remanded it to the Board with directions to hear and consider the additional evidence in support of a similar defense. Furthermore, in refusing to permit petitioner to prove its defense or consider evidence admitted, the court has approved an order in which the Board has failed to consider facts and circumstances which ought to have been considered, contrary to the Fifth Amendment to the Constitution.

Moreover, the decision of the court below is contrary to the result reached by the Board and the Circuit Court of Appeals for the Tenth Circuit in *Magnolia Petroleum Co.* v. *National Labor Relations Board* (1940) 115 F. (2d) 1007 where the Board refused to disestablish an unaffiliated union wherever it had been accepted as an election rival by the nationally affiliated charging union.

Consequently, not only has petitioner been deprived of due process, but also the rights of 3600 employees guaranteed under Section 7 of the Act have been brushed aside by the Board in professing to effectuate the policies of the Act contrary to the decision of this Court in *Consolidated Edison Co., etc.* v. *National Labor Relations Board* (1938) 305 U. S. 197, 238.

4. The decision of the court below in enforcing the broad provisions of paragraphs 1 (c) and 2 (c) of the Board's order prohibiting acts not charged in the complaint, is, under the circumstances in this record, squarely in conflict with the decision of this Court in *National Labor Relations Board* v. *Express Publishing Co.* (1941) 312 U. S. 426.

5. The conflicts between the decisions aforementioned and the instant one should be resolved by this Court. Unless they are resolved, employers such as petitioner will be subject to the whims and caprice of administrative fiat.

Conclusion.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Circuit Court of Appeals for the Seventh Circuit, to certify and to send to this Court for its review and determination, on a day certain to be therein named, a transcript of the record in proceedings herein; and that the decree of said Circuit Court of Appeals be reversed by this Honorable Court and your petitioner have such other and further relief in the premises as to this Honorable Court may seem meet and just.

Respectfully submitted,

PAUL WARE,
Counsel for Petitioner.

April, 1942.